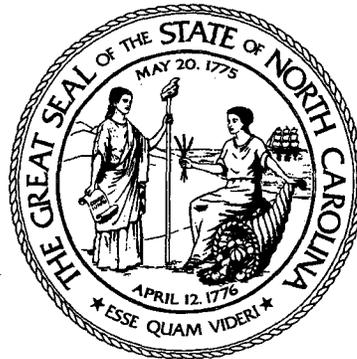


LEGISLATIVE RESEARCH COMMISSION

ADMINISTRATIVE PROCESS FOR STATE EMPLOYEE GRIEVANCES



REPORT TO THE
2000 SESSION OF THE
1999 GENERAL ASSEMBLY
OF NORTH CAROLINA

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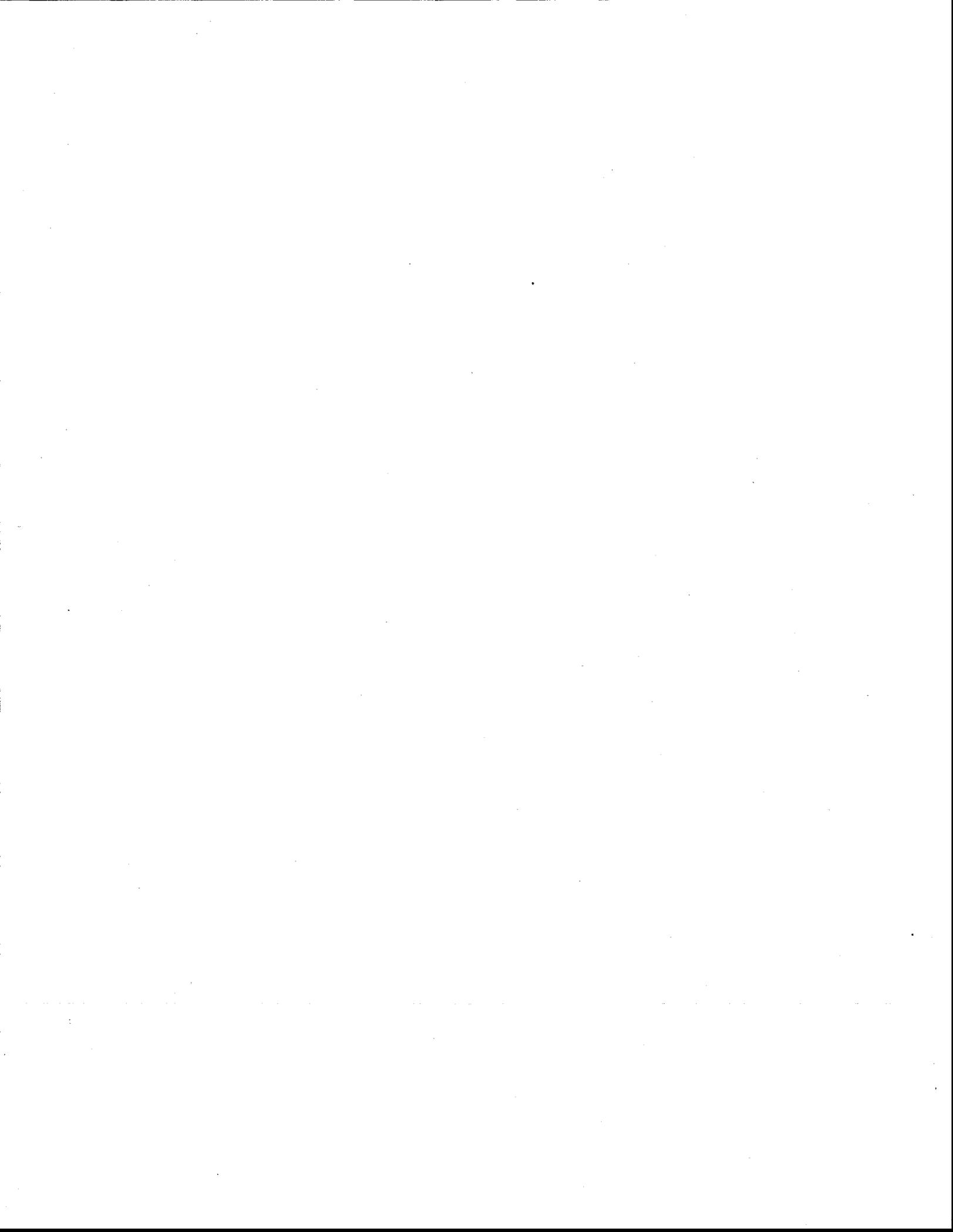
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STATE OF NORTH CAROLINA
LEGISLATIVE RESEARCH COMMISSION
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RALEIGH, NC 27601



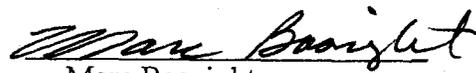
May 4, 2000

TO THE MEMBERS OF THE 1999 GENERAL ASSEMBLY (REGULAR SESSION 2000):

The Legislative Research Commission herewith submits to you for your consideration its 2000 interim report on family and medical leave for State employees. The report was prepared by the Legislative Research Commission's Committee on the Administrative Process for State Employee Grievances pursuant to G.S. 120-30.17(1).

Respectfully submitted,


James B. Black
Speaker of the House


Marc Basnight
President Pro Tempore

Cochairs
Legislative Research Commission



1999 - 2000

LEGISLATIVE RESEARCH COMMISSION

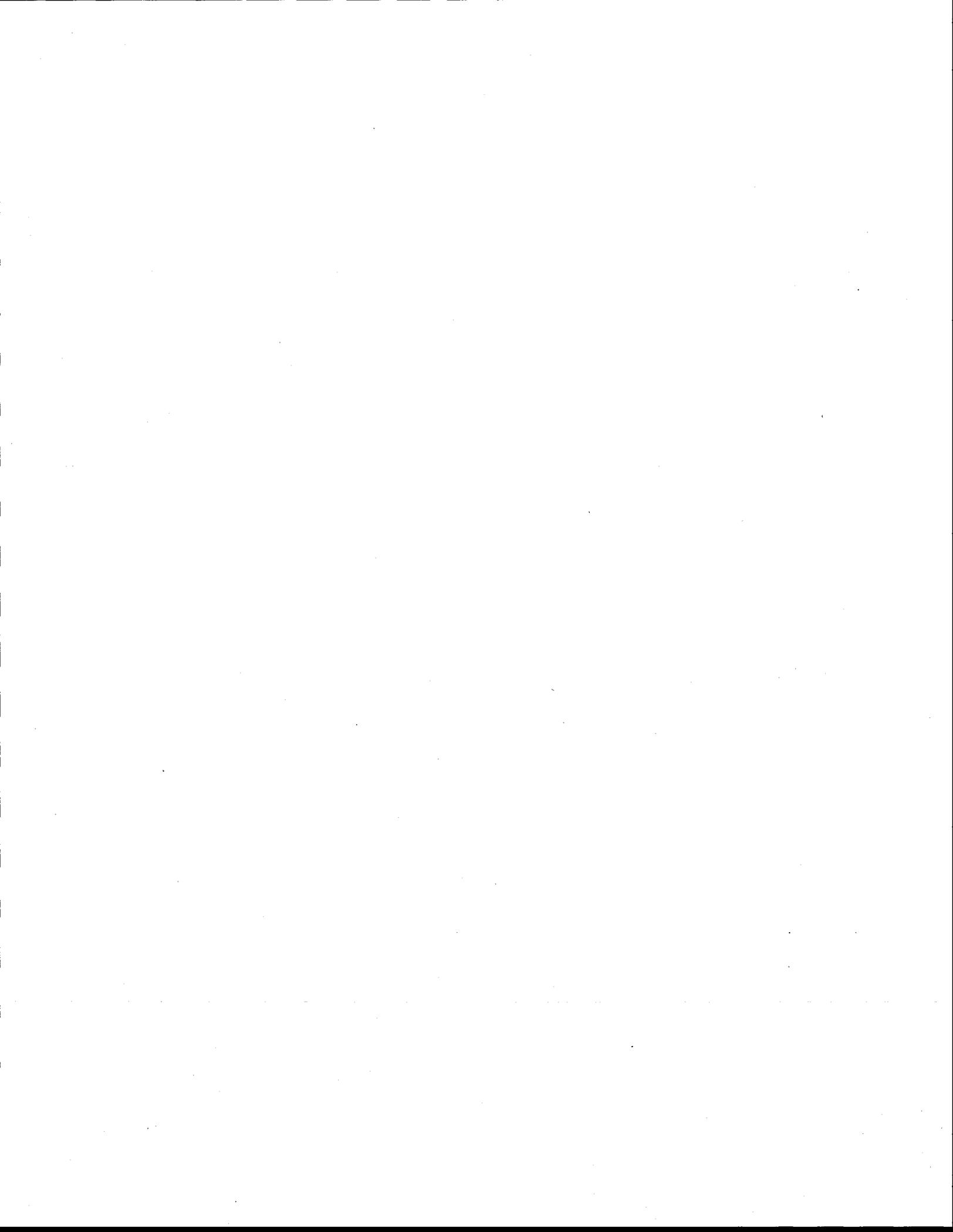
MEMBERSHIP

President Pro Tempore of the Senate
Marc Basnight, Cochair

Speaker of the House of Representatives
James B. Black, Cochair

Senator Austin M. Allran
Senator Linda D. Garrou
Senator Jeanne H. Lucas
Senator R.L. "Bob" Martin
Senator Ed N. Warren

Rep. James W. Crawford, Jr.
Rep. Beverly M. Earle
Rep. Verla C. Insko
Rep. William L. Wainwright
Rep. Steve W. Wood



PREFACE

The Legislative Research Commission, established by Article 6B of Chapter 120 of the General Statutes, is the general purpose study group in the Legislative Branch of State Government. The Commission is cochaired by the Speaker of the House and the President Pro Tempore of the Senate and has five additional members appointed from each house of the General Assembly. Among the Commission's duties is that of making or causing to be made, upon the direction of the General Assembly, "such studies of and investigations into governmental agencies and institutions and matters of public policy as will aid the General Assembly in performing its duties in the most efficient and effective manner" (G.S. 120-30.17(1)).

The Legislative Research Commission, prompted by actions during the 1998 Session and 1999 Sessions, has undertaken studies of numerous subjects. These studies were grouped into broad categories and each member of the Commission was given responsibility for one category of study. The Cochairs of the Legislative Research Commission, under the authority of G.S. 120-30.10(b) and (c), appointed committees consisting of members of the General Assembly and the public to conduct the studies. Cochairs, one from each house of the General Assembly, were designated for each committee.

The study of the Administrative Process for State Employee Grievances was authorized by Section 2.1 (1)c of Chapter 395 of the 1999 Session Laws (Regular Session, 1999). Part II of Chapter 395 allows for studies authorized by that Part for the Legislative Research Commission to consider House Joint Resolution 1014 in determining the nature, scope and aspects of the study. Section 1 of House Joint Resolution states that "The Legislative Research Commission

may study all aspects of the administrative process for State employee grievances, including: (1) Review of the timeliness of, and reasons for delay in, the resolution of State employee grievances; and (2) Examination of the rate at which the State Personnel Commission and other State agencies adopt, modify, and reject recommended decisions of administrative law judges.” The relevant portions of Chapter 395 are included in Appendix A.

The Legislative Research Commission authorized this study under authority of G.S. 120-30.17(1) and grouped this study in its Governmental Personnel Grouping area under the direction of Senator Jeanne Hopkins Lucas. The Committee was chaired by Senator Brad Miller and Representative Pryor Gibson. The full membership of the Committee is listed in Appendix B of this report. A committee notebook containing the committee minutes and all information presented to the committee will be filed in the Legislative Library by the end of the 1999-2000 biennium.

COMMITTEE PROCEEDINGS

The Legislative Research Commission's Administrative Process for State Employee Grievances Committee met once prior to the 2000 Regular Session of the 1999 General Assembly. The Committee learned about a recent case in which a State employee was denied benefits under the federal Family and Medical Leave Act (FMLA). Congress passed the Family and Medical Leave Act in 1993 and specifically made it applicable to state and local governmental employers. However, recent federal court cases have raised questions as to whether (1) Congress acted within the scope of its authority in abrogating state's immunity under the Eleventh Amendment of the Constitution, and (2) the Family and Medical Leave Act is unconstitutional as applied to the states under the Tenth Amendment.

Soon after the law was enacted in 1993, the State Personnel Commission adopted rules applying the federal law to state employees. The statutory authority they cited was G.S. 126-4(5) which gives the State Personnel Commission authority to establish policies and rules governing the hours and days of work, holidays, vacation, sick leave, and other matters pertaining to the conditions of employment. However, the rules specifically provide that "violation of or denial of leave requested pursuant to the FMLA is not a contested case and creates no right of grievance or appeal pursuant to the State Personnel Act."

In view of these recent developments, the Committee considered a proposal granting family and medical leave benefits to State employees under State law.

The following is a brief summary of the Committee's proceedings. Detailed minutes of each Committee meeting are available in the Legislative Library.

April 27, 2000

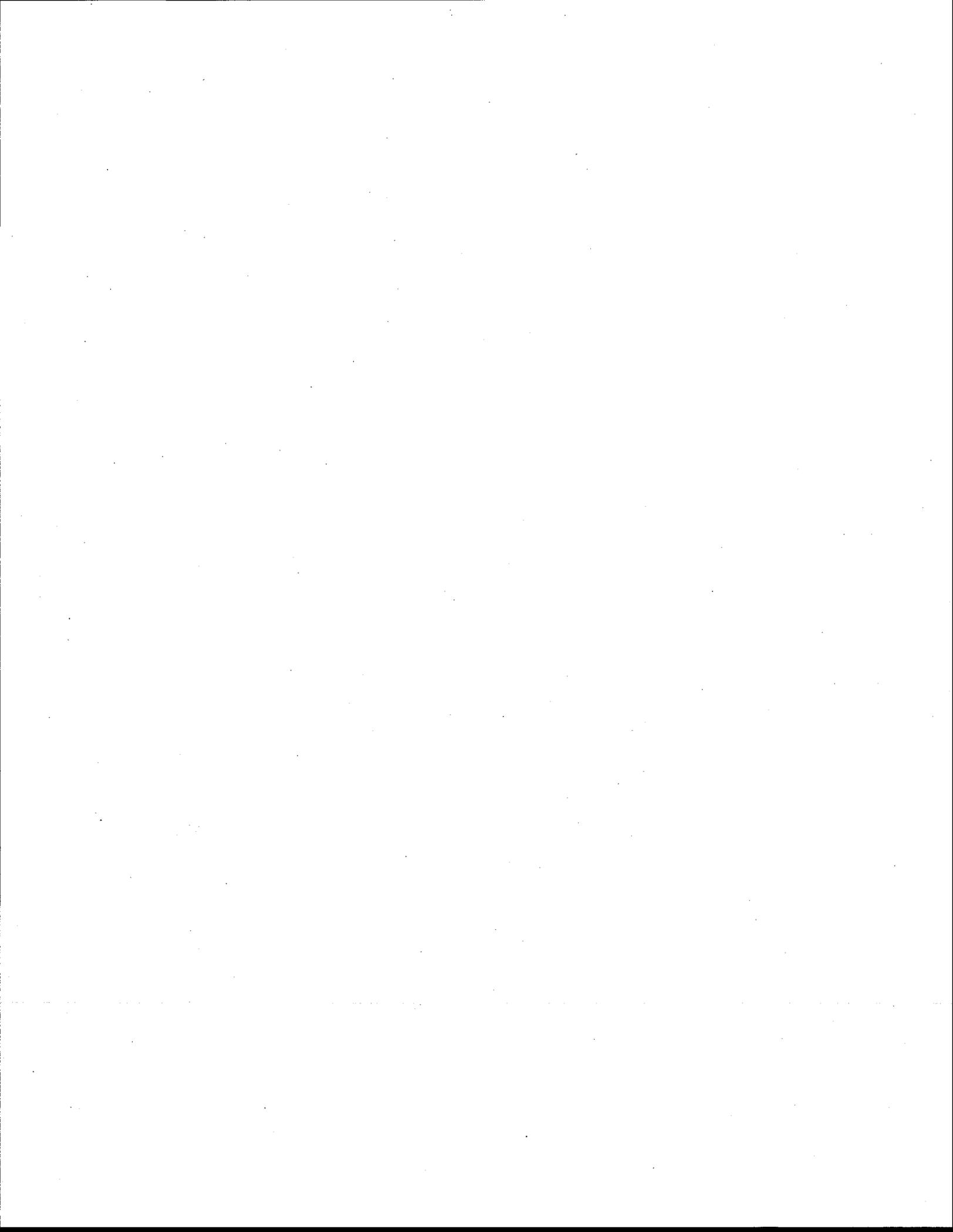
The Committee met prior to the convening of the 2000 Session at 2:00 p.m. on April 27, 2000 in Room 415 of the Legislative Office Building. During this meeting the Committee discussed and approved the interim report to be submitted to the Legislative Research Commission.

FINDINGS AND RECOMMENDATIONS

The Committee finds there is evidence that the State needs a law granting family and medical leave to State employees and recommends the following proposed legislation:

Proposal

A BILL TO BE ENTITLED AN ACT CLARIFYING STATE EMPLOYEES' ELIGIBILITY FOR FAMILY AND MEDICAL LEAVE BENEFITS.



APPENDIX A

CHAPTER 395 1999 Session Laws (1999 Session)

AN ACT TO AUTHORIZE STUDIES BY THE LEGISLATIVE RESEARCH COMMISSION, TO CREATE VARIOUS STUDY COMMISSIONS, TO DIRECT STATE AGENCIES AND LEGISLATIVE OVERSIGHT COMMITTEES AND COMMISSIONS TO STUDY SPECIFIED ISSUES, AND TO AMEND OTHER LAWS.

The General Assembly of North Carolina enacts:

PART I.-----TITLE

Section 1. This act shall be known as "The Studies Act of 1999".

PART II.-----LEGISLATIVE RESEARCH COMMISSION

Section 2.1. The Legislative Research Commission may study the topics listed below. When applicable, the bill or resolution that originally proposed the issue or study and the name of the sponsor is listed. Unless otherwise specified, the listed bill or resolution refers to the measure introduced in the 1999 Regular Session of the 1999 General Assembly. The Commission may consider the original bill or resolution in determining the nature, scope, and aspects of the study. The following groupings are for reference only:

(1) Governmental Agency and Personnel Issues:

...
c. Administrative process for State employee grievances (H.B. 1014 - Miller).

Section 2.2. Committee Membership. -- For each Legislative Research Commission committee created during the 1999-2001 biennium, the cochairs of the Legislative Research Commission shall appoint the committee membership.

Section 2.3. Reporting Date. -- For each of the topics the Legislative Research Commission decides to study under this Part or pursuant to G.S. 120-30.17(1), the Commission may report its findings, together with any recommended legislation, to the 1999 General Assembly, 2000 Regular Session, or the 2001 General Assembly.

Section 2.4. Funding. -- From the funds available to the General Assembly, the Legislative Services Commission may allocate additional monies to fund the work of the Legislative Research Commission.

...

PART XXII.-----BILL AND RESOLUTIONS REFERENCES

Section 22.1. The listing of the original bill or resolution in this act is for reference purposes only and shall not be deemed to have incorporated by reference any of the substantive provisions contained in the original bill or resolution.

PART XXIII.-----EFFECTIVE DATE AND APPLICABILITY

Section 23.1. Except as otherwise specifically provided, this act becomes effective July 1, 1999. If a study is authorized both in this act and the Current Operations Appropriations Act of 1999, the study shall be implemented in accordance with the Current Operations Appropriations Act of 1999 as ratified.

In the General Assembly read three times and ratified this the 21st day of July, 1999.

s/ Dennis A. Wicker
President of the Senate

s/ James B. Black
Speaker of the House of Representatives

s/ James B. Hunt, Jr.
Governor

Approved 9:03 p.m. this 5th day of August, 1999

APPENDIX B

ADMINISTRATIVE PROCESS FOR STATE
EMPLOYEE GRIEVANCES COMMITTEE (LRC)

1999-2001

S.L. 1999-395

ProTem's Appointments

Senator Brad Miller, Cochair
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(919) 881-9609

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Oak City, NC 27857

Senator Jeanne H. Lucas
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Ms. Elizabeth G. McCrodden
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Staff:

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Rep. Robert J. Hensley, Jr.
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Raleigh, NC 27603
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Rep. Margaret Jeffus
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Greensboro, NC 27403
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Rep. Larry Womble
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Winston-Salem, NC 27107
(336) 784-9373

Clerk:

Cornelia McMillan
(919) 733-9349

APPENDIX C

NORTH CAROLINA ADMINISTRATIVE CODE

25-1E.14. FAMILY AND MEDICAL LEAVE

- 25-1E.1401. PURPOSE AND SCOPE.
- 25-1E.1402. ELIGIBLE EMPLOYEES.
- 25-1E.1403. DEFINITIONS.
- 25-1E.1404. LEAVE CHARGES.
- 25-1E.1405. INTERMITTENT LEAVE OR REDUCED WORK SCHEDULE.
- 25-1E.1406. AGENCY RESPONSIBILITY.
- 25-1E.1407. EMPLOYEE RESPONSIBILITY.
- 25-1E.1408. CERTIFICATION.
- 25-1E.1409. EMPLOYMENT AND BENEFITS PROTECTION.
- 25-1E.1410. INTERFERENCE WITH RIGHTS.
- 25-1E.1411. RECORDKEEPING REQUIREMENTS.

25-1E.1401. PURPOSE AND SCOPE

The Family and Medical Leave Act of 1993 was passed by Congress to balance the demands of the workplace with the needs of families; to promote the stability and economic security of families; to promote national interests in preserving family integrity; to minimize the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons; and to promote the goal of equal employment opportunity for women and men. These Rules provide for the implementation of the Family and Medical Leave Act of 1993 as it pertains to those employees subject to G.S. 126.

Statutory Authority G.S. 126-4(5); P.L. 103-3;
Eff. August 2, 1993.

25-1E.1402. ELIGIBLE EMPLOYEES

(a) Determining Eligibility - An employee's eligibility for Family and Medical Leave shall be made based on the employee's months of service and hours of work as of the date leave is to commence.

(b) Permanent, Probationary, Trainee, and Time-Limited - An employee who has been employed with State government for at least 12 months and who has been in pay status at least 1040 hours (half-time) during the previous 12 month period is entitled to a total of 12 workweeks, paid or unpaid, leave during any 12 month period for one or more of the reasons listed in this Paragraph.

(1) For the birth of a child and to care for the newborn child after birth., provided the leave is taken within a 12-month period following birth; (An expectant mother may also take Family and Medical Leave pursuant to paragraph (b)(4) of this Rule before the birth of the child for prenatal care or if her condition makes her unable to work.)

(2) For the placement of or to care for a child placed with the employee for adoption or foster care, provided the leave is taken within a 12-month period following adoption; (Family and Medical Leave must also be granted before the actual placement or adoption of a child if an absence from work is required for the placement for adoption or foster care to proceed.)

(3) For the employee to care for the employee's child, spouse, or parent, where that child, spouse, or parent has a serious health condition; or

(4) Because the employee has a serious health condition that makes the employee unable to perform one or more of the functions of the employee's position.

Leave without pay beyond the 12-week period for employees not covered under this Section shall be administered under 25 NCAC IE .1100 Other Leave Without Pay. Under these provisions, employees must pay for health benefits coverage.

(c) Temporary Employees - This Section does not cover temporary employees since the maximum length of a temporary employees' appointment is one year. The employee shall be covered if the employee has worked at least 1250 hours during the past 12-month period. Any leave granted to a temporary employee shall be without pay. This also applies to intermittent appointments.

Statutory Authority G.S. 126-4(5); P.L. 103-3;

Eff. August 2, 1993; Eff. October 1, 1995; December 1, 1993.

25-1E.1403. DEFINITIONS

(a) Parent - a biological or adoptive parent or an individual who stood in loco parentis (a person who is in the position or place of a parent) to an employee when the employee was a child.

(b) Child - as on or daughter who is under 18 years of age or is 18 years of age or older and incapable of self-care because of a mental or physical disability who is:

(1) a biological child;

(2) an adopted child;

(3) a foster child - a child for whom the employee performs the duties of a parent as if it were the employee's child;

(4) a stepchild - a child of the employee's spouse from a former marriage;

(5) a legal ward - a minor child placed by the court under the care of a guardian; or

(6) a child of an employee standing in loco parentis.

(c) Spouse - a husband or wife recognized by the State of North Carolina.

(d) Serious health condition - an illness, injury, impairment, or physical or mental condition that involves:

(1) inpatient care (i.e., an overnight stay) in a hospital, hospice or residential medical facility, including any period of incapacity (defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment for or recovery from), or any subsequent treatment in connection with such impairment; or

(2) continuing treatment by a health care provider involving one or more of the following:

(A) a period of incapacity as defined above of more than three consecutive days, and any subsequent treatment or period of incapacity relating to the same condition that also involves:

(i) treatment two or more times by a health care provider, by a nurse or physician's assistant under the direct supervision of a health care provider, or a provider of health care services (e.g., physical therapist) under orders of, or on referral by a health care provider, or

(ii) treatment on at least one occasion resulting in a regime of continuing treatment under the supervision of the health care provider (course of prescription medication, i.e., antibiotic, or therapy requiring special equipment to alleviate the health condition, i.e., oxygen).

(B) any period of incapacity due to pregnancy or for prenatal care, even when the employee or family member does not receive treatment from a health care provider during the absence and even if the absence does not last more than three days (prenatal examinations, severe morning sickness).

(C) any period of incapacity or treatment due to a "chronic serious health condition", even when the employee or family member does not receive treatment from a health care provider during the absence and even if the absence does not last more than three days, which is defined as one:

(i) requiring periodic visits or treatment by a health care provider, or by a nurse or physician's assistant under the direct supervision of a health care provider:

(ii) continuing over an extended period of time (including recurring episodes of a single underlying condition); and

(iii) which may cause episodic rather than continuing period(s) of incapacity (e.g., asthma, diabetes, epilepsy, etc.).

(D) incapacity for a permanent or long-term condition for which treatment may not be effective (alzheimers, a severe stroke or terminal stages of a disease).

(E) multiple treatments for restorative surgery or incapacity for serious conditions that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment (chemotherapy, radiation, dialysis, etc.).

(e) Health Care Provider.

(1) a Doctor of medicine or osteopathy who is authorized to practice medicine or surgery in the State of North Carolina or;

(2) any other person determined by statute, credential or licensure to be capable of providing health care services which include:

(A) Podiatrists

(B) Dentists

(C) Clinical Psychologists

(D) Optometrists

(E) Chiropractors (limited to manual manipulation of spine to correct subluxation shown on radiographs)

(F) Nurse Practitioners

(G) Nurse Midwives

(H) Clinical Social Workers

(I) Christian Science Practitioners listed with First Church of Christ, Scientists in Boston, Massachusetts. (An agency may require an employee to obtain a second or third certification from a health care provider who is not a Christian Science practitioner.)

(J) Health Care Providers from whom state approved group and HMO health plans will accept certification of serious health conditions to substantiate a claim for benefits

(K) Foreign Health Care Providers in above stated areas who are authorized to practice in that country and who are performing within the scope of the laws

(f) Workweek - The number of hours an employee is regularly scheduled to work each week.

(g) Reduced Work Schedule - A work schedule involving less hours than an employee is regularly scheduled to work.

(h) Intermittent Work Schedule A work schedule in which an

employee works on an irregular basis and is taking leave in separate blocks of time, rather than for one continuous period of time, usually to accommodate some form of regularly scheduled medical treatment.

(i) 12-month period:

(1) the calendar year;

(2) any fixed 12-month "leave year";

(3) the 12-month period measured forward from the date any employee's first Family and Medical leave begins, or

(4) a "rolling" 12-month period measured backward from the date an employee uses any FMLA leave.

The agency may choose either alternative provided it is applied consistently and uniformly to all employees. Employees must be given 60 days notice of any change and must not lose any benefits because of a transition.

Statutory Authority G.S. 126-4(5); P.L. 103-3;

Eff. August 2, 1993; Amended Eff. October 1, 1995; December 1, 1993.

25-1E.1404. LEAVE CHARGES

(a) Periods of paid leave and periods of leave without pay (including leave without pay while drawing short-term disability benefits) count towards the 12 workweeks to which the employee is entitled. This includes leave taken under the Voluntary Shared Leave Rules (25 NCAC 1E .1300).

(b) Workers' Compensation Leave - If an employee is out of workers compensation leave drawing temporary total disability, the time away from work is not considered as a part of the family and medical leave 12-week entitlement.

(c) Compensatory Leave - The agency cannot require an employee to use compensatory time for unpaid family and medical leave.

(d) Employee Options - The employee has the following options for charging leave:

(1) For the birth of a child, the employee may choose to exhaust available vacation or sick leave, or any portion, or go on leave without pay; except that sick leave may be used during the period of disability. This applies to both parents.

(2) For the adoption of a child, the employee may choose to exhaust a maximum of 30 days sick leave, available vacation leave, or any portion, or go on leave without pay.

(3) For the illness of an employee's child, spouse, or parent, the employee may choose to exhaust available sick or vacation leave, or any portion, or go on leave without pay.

(4) For the employee's illness, the employee shall exhaust available sick leave and may choose to exhaust available vacation leave, or any portion, before going on leave without pay. If the illness extends beyond the 60-day waiting period required for short-term disability, the employee may choose to exhaust the balance of available leave or begin drawing short-term disability benefits.

Statutory Authority G.S. 126-4(5); P.L. 103-3;

Eff. August 2, 1993; Amended Eff. October 1, 1995; December 1, 1993.

25-1E.1405. INTERMITTENT LEAVE OR REDUCED WORK SCHEDULE

(a) The employee may not take leave intermittently or on a reduced work schedule for child birth and birth related child care or for adoption unless the employee and agency agree otherwise.

(b) When medically necessary, the employee may take leave intermittently or on a reduced schedule to care for the employee's child, spouse, or parent who has a serious health condition. There is no minimum limitation on the amount of leave taken intermittently; however, the agency may not require leave to be taken in increments of more than one hour. If such leave is foreseeable, based on planned medical treatment, the agency may require the employee to transfer temporarily to an available alternative position for which the employee is qualified and that has equivalent pay and benefits and better accommodates recurring periods of leave.

(c) Only the time actually taken as leave may be counted toward the 12 weeks of leave to which the employee is entitled when leave is taken intermittently or on a reduced leave schedule. If the employee works a reduced or intermittent work schedule and does not use paid leave to make up the difference between the normal work schedule and the new temporary schedule to bring the number of hours worked up to the regular schedule, the agency must submit a Form PI)-105 showing a change in the number of hours the employee is scheduled to work. This will result in an employee earning leave at a reduced rate.

Statutory Authority G.S. 126-4(5); P.L. 103-3;

Eff. August 2, 1993; Amended Eff. October 1, 1995; December 1, 1993.

25-1E.1406. AGENCY RESPONSIBILITY

(a) Posting and Notification Requirements of Family and Medical Leave Act Provisions - Agencies shall post and keep posted, in a conspicuous place, a notice explaining the Family and Medical Leave Act provisions and providing information concerning the procedures for filing complaints of violations of the Act with the U.S. Department of Labor, Wage and Hour Division. The agency must include the provisions of this Section in all written publications, such as handbooks, etc. In addition, each time an employee provides notice of the need for family and medical leave, the agency shall provide the employee with written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations.

(b) Notice of Eligibility - The agency shall determine that an employee is eligible for family and medical leave. If an employee notifies the employer of the need for family and medical leave before the employee meets the eligibility criteria, the agency shall:

(1) confirm the employee's eligibility effective on the date leave is to start; or

(2) advise the employee when the requirement will be met.

This decision may not be reversed. No additional notice for family and medical leave from the employee is required. If the agency does not advise the employee whether the employee is eligible prior to the date the leave is to start, the employee shall be deemed eligible. The agency shall not deny the leave.

If the employee does not give notice of the need for leave more than two workdays before beginning leave, the employee shall be deemed to be eligible unless notified of ineligibility within two workdays of the date the notice is received.

(c) Designation of Leave as Family and Medical Leave. The agency shall:

- (1) determine that leave requested is for a family and medical leave qualifying reason, and
- (2) designate leave, whether paid or unpaid, as family and medical leave even when an employee would rather not use any of the employee's family and medical leave entitlement.

The key in designating family and medical leave is the qualifying reason(s), not the employee's election or reluctance to use family and medical leave or to use all, some or none of the accrued leave. The agency's designation must be based on information obtained from the employee or an employee's representative (e.g., spouse, parent, physician, etc.).

(d) Designation of Paid Leave as Family and Medical Leave. When an employee gives notice of the need for family and medical leave and the employee is using paid leave, whether required or optional, the agency shall designate whether it qualifies for family and medical leave before the leave starts. If information is not sufficient to make the determination, the agency shall require the employee to provide the information. All leave taken may be designated as family and medical leave; however, if sufficient information was available and the designation or notice was not given, the leave may not be designated as family and medical leave retroactively.

When an employee is on paid leave but has not given notice of the need for family and medical leave, the agency shall, after a period of 10 workdays, request that the employee provide sufficient information to establish whether the leave is for a family and medical leave qualifying reason. This does not preclude the agency from requesting the information sooner, or at any time an extension is requested.

If an absence which begins as other than family and medical leave later develops into a family and medical leave qualifying absence, the entire portion of the leave period that qualifies under the Family and Medical Leave Act may be counted as family and medical leave.

Once the agency has knowledge that the leave is being taken for a family and medical leave required reason, the agency must, within two business days absent extenuating circumstances, notify the employee that the leave is designated and will be counted as family and medical leave. The notice may be oral or in writing, but must be confirmed in writing no later than the following payday.

(e) Designation of Family and Medical Leave After Return to Work The agency shall not designate leave that has already been taken as family and medical leave until the employee returns to work, except:

- (1) if an employee is out for a reason that qualifies for family and medical leave and the agency does not learn of the reason for the leave until the employee returns to work, the agency may designate the leave as family and medical leave within two business days of the employee's return; or

- (2) if the agency has provisionally designated the leave under family and medical leave and is awaiting receipt from the employee of documentation.

Similarly, the employee is not entitled to the protection of the Family and Medical Leave Act if the employee gives notice of the reason for the leave later than two days after returning to work.

Statutory Authority G.S. 126-4(5); P.L. 103-3;

Eff. August 2, 1993; Amended Eff. October 1, 1995; December 1, 1993.

25-1E.1407. EMPLOYEE RESPONSIBILITY

(a) The employee shall give notice to the supervisor for leave requested under this Section. The employee must explain the reasons for the needed leave in order to follow the agency to determine that the leave qualifies under this Section.

(1) Birth or adoption - The employee shall give the agency no less than 30 days notice, in writing, of the intention to take leave, subject to the actual date of the birth or adoption. If the date of the birth or adoption requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable, which means within one or two business days of when the need for leave becomes known to the employee.

(2) Planned Medical Treatment - When the necessity for leave is to care for the employee's child, spouse or parent or because the employee has a serious health condition, the employee must give 30 days notice if practicable of the intention to take leave. For planned medical treatment, employee consultation with the supervisor prior to the request for family and medical leave is mandatory.

(3) Medical Emergency In the case of a medical emergency requiring leave because of an employee's own serious health condition, an agency shall not require written advance notice.

(b) If the employee will not return to work, the agency shall be notified in writing. Failure to report at the expiration of the leave, unless an extension has been requested, may be considered as a resignation.

(c) Certification - The employee shall provide certification in accordance with the provisions set out in Rule 25 NCAC 1E .1408 of this Section. If the employee does not provide medical certification, any leave taken is not family and medical leave.

Statutory Authority G.S. 126-4(5); P.L 103-3;

Eff. August 2, 1993; Amended Eff. October 1, 1995.

25-1E.1408. CERTIFICATION

(a) Adoption - The agency may require that a claim for leave because of adoption be supported by evidence that is satisfactory to the agency.

(b) Medical Certification - The agency may require that a claim for leave because of a serious illness of the employee or of the employee's child, spouse, or parent be supported by a certification from the health care provider; however, if the employee is using paid leave, the agency shall not require a more stringent certification than normally required. If the employee is using unpaid family and medical leave, the certification requirements shall be no greater than the following:

(1) When the leave is foreseeable and at least 30 days notice has been provided, the employee shall provide the medical certification before the leave begins.

(2) When it is not possible to provide the medical certification before the leave begins, the employee must provide the requested certification to the agency with the time frame requested by the agency (which must allow at least 15 calendar days after the agency's request), unless it is not practicable under the circumstances.

(3) At the time the agency requests certification, the agency must also advise the employee of the anticipated consequences of an employee's failure to provide adequate certification. The

agency shall so provide the employee a reasonable opportunity to correct any incomplete information.

(c) Medical Certification Form - Form WH-380, is an optional form that was developed by the Department of Labor for use in obtaining medical certification, including second and third opinions. Another form containing the same basic information may be used; however, no information in addition to that requested on Form WH-380 may be required.

(d) Validity of the Certification.

(1) If an employee submits a complete certification signed by the health care provider, the agency may not request additional information; however, a health care provider representing the agency may contact the employee's health care provider, with the employee's permission, for purposes of clarification and authenticity of the medical certification.

(2) An agency who has reason to doubt the validity of a medical certification may require the employee to obtain a second opinion at the agency's expense. Pending receipt of the second (or third) opinion the employee is provisionally entitled to family and medical leave. If the certifications do not ultimately establish the employee's entitlement to family and medical leave, the leave shall not be designated as family and medical leave. The agency may designate the health care provider to furnish the second opinion, but the selected health care provider may not be employed on a regular basis by the agency unless the agency is located in an area where access to health care is extremely limited.

(3) If the opinions of the employee's and the agency's designated health care providers differ, the agency may require the employee to obtain certification from a third health care provider, again at the agency's expense. This third opinion shall be final and binding. The third health care provider must be designated or approved jointly by the agency and the employee.

(4) The agency must reimburse an employee or family for reasonable "out of pocket" travel expenses incurred to obtain the second and third medical opinions. The agency may not require the employee or family member to travel outside normal commuting distance except in very unusual circumstances.

(5) The agency shall provide the employee, within two business days, with a copy of the second and third medical opinions, where applicable, upon request by the employee.

(e) Recertification of Medical Conditions.

(1) An agency may request recertification no more often than every 30 days unless:

(A) an extension is requested,

(B) circumstances described by the previous certification have changed significantly, or

(C) the agency receives information that casts doubt upon the employee's stated reason for the absence.

(2) If the minimum duration specified on a certification is more than 30 days, the agency may not request recertification until that minimum duration has passed unless one of the conditions in Paragraph (e)(1)(A), (B) or (C) of this Rule is met.

(3) The employee must provide the requested recertification to the agency within the time frame requested by the agency (which must allow at least 15 calendar days after the agency's request), unless it is not practicable under the particular circumstances.

(4) Any recertification requested by the agency shall be at the employee's expense unless the agency provides otherwise. No second or third opinion on recertification may be required.

Statutory Authority G.S. 126-4(5); P.L. 103-3;

Eff. August 2, 1993; Amended Eff. October 1, 1995; December 1, 1993.

25-1E.1409. EMPLOYMENT AND BENEFITS PROTECTION

(a) Reinstatement - The employee shall be reinstated to the same position held when the leave began or one of like pay grade, pay, benefits, and other conditions of employment. The agency may require the employee to report at reasonable intervals to the agency on the employee's status and intention to return to work. The agency also may require that the employee provide certification that the employee is able to return to work.

(b) Benefits - The employee shall be reinstated without loss of benefits accrued when the leave began. All benefits accrue during any period of paid leave; however, no benefits will be accrued during any period of leave without pay.

(c) Health Benefits - The State shall maintain coverage for the employee under the State's group health plan for the duration of leave at the level and under the conditions coverage would have been provided if the employee had continued employment. Any share of health plan premiums which an employee had paid prior to leave must continue to be paid by the employee during the leave period. The agency must give advance written notice to employees of the terms for payment of premiums during family and medical leave. The obligation to maintain health insurance coverage stops if an employee's premium payment is more than 30 days late. The agency must provide 15 days notice that coverage will cease. If the employee's failure to make the premium payments leads to a lapse in coverage, the agency must still restore the employee, upon return to work, to the health coverage equivalent to that the employee would have had if leave had not been taken and the premium payments had not been missed without any waiting period or preexisting conditions. The agency may recover the premiums if the employee fails to return after the period of leave to which the employee is entitled has expired for a reason other than the continuation, recurrence, or onset of a serious health condition or other circumstances beyond the employee's control.

Statutory Authority G.S. 126-4(5); P.L. 103-3;

Eff. August 2, 1993; Amended Eff. October 1, 1995.

25-1E.1410. INTERFERENCE WITH RIGHTS

(a) Actions Prohibited - It is unlawful to interfere with, restrain, or deny any right provided by this Section or to discharge or in any other manner discriminate against an employee for opposing any practice made unlawful by this Section.

(b) Protected Activity - It is unlawful to discharge or in any other manner discriminate against any employee because the employee does any of the following:

(1) Files any civil action, or institutes or causes to be instituted any civil proceeding under or related to this Section;

(2) Gives, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided by this Section; or

(3) Testifies, or is about to testify, in any inquiry or proceeding relating to any right provided under this Section.

(c) A violation of or denial of leave requested pursuant to the Family and Medical Leave Act of 1993 is not a contested case and creates no right of grievance or appeal pursuant to the State

Personnel Act 126). Violations may result in any of the following or a combination of any of the following and are enforced by the U.S. Secretary of Labor:

- (1) U.S. Department of Labor investigation; or
- (2) Civil liability with the imposition of court cost and attorney's fees; or
- (3) Administrative action by the U.S. Department of Labor.

Statutory Authority G.S. 126-4(5); P.L. 103-3;
Eff. October 1, 1995.

25-1E.1411. RECORDKEEPING REQUIREMENTS

(a) Agencies shall keep records for no less than three years and make them available to the Department of Labor upon request. In addition to the records required by the Fair Labor Standards Act, the agency must keep records of:

- (1) dates family and medical leave is taken,
- (2) hours of leave if less than a full day,
- (3) copies of employee notices,
- (4) documents describing employee benefits,
- (5) premium payments of employee benefits, and
- (6) records of any disputes.

(b) Records and documents relating to medical certifications, recertifications or medical histories of employees or employees' family members, created for purposes of family and medical leave, shall be maintained as confidential medical records in separate files/records from the usual personnel files, and if the American With Disabilities Act (ADA) is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements, except that:

- (1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;
- (2) First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatments; and
- (3) Government officials investigating compliance with the Family and Medical Leave Act (or other pertinent law) shall be provided relevant information upon request.

Statutory Authority G.S. 126-4(5); P.L. 103-3.
Eff. October 1, 1995.

Family and Medical Leave

Purpose

The Family and Medical Leave Act of 1993 was passed by Congress to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity; to minimize the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons; and to promote the goal of equal employment opportunity for women and men.

Definitions

Following are the definitions of terms used in this policy:

Term	Definition
Parent	a biological or adoptive parent or an individual who stood in loco parentis (a person who is in the position or place of a parent) to an employee when the employee was a child.
Child	<p>a son or daughter who is:</p> <ul style="list-style-type: none"> • under 18 years of age, or • is 18 years of age or older and incapable of self-care because of a mental or physical disability <p>and who is:</p> <ul style="list-style-type: none"> • a biological child, • an adopted child, • a foster child (a child for whom the employee performs the duties of a parent as if it were the employee's child), • a step-child (a child of the employee's spouse from a former marriage), • a legal ward (a minor child placed by the court under the care of a guardian), or • a child of an employee standing in loco parentis.

Continued on next page

Family and Medical Leave, Continued**Definitions (continued)**

Spouse	A husband or wife recognized by the State of North Carolina
Serious Health Condition	<p>an illness, injury, impairment, or physical or mental condition that involves:</p> <ol style="list-style-type: none"> 1. inpatient care (i.e., an overnight stay) in a hospital, hospice or residential medical facility, including any period of incapacity (defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment for or recovery from), or any subsequent treatment in connection with such impairment; or 2. continuing treatment by a health care provider involving one or more of the following: <ol style="list-style-type: none"> a. a period of incapacity as defined above of more than three consecutive days, and any subsequent treatment or period of incapacity relating to the same condition that also involves: <ul style="list-style-type: none"> • treatment two or more times by a health care provider, by a nurse or physician's assistant under the direct supervision of a health care provider, or a provider of health care services (e.g., physical therapist) under orders of, or on referral by a health care provider, or • treatment on a least one occasion resulting in a regime of continuing treatment under the supervision of the health care provider (course of prescription medication, i.e., antibiotic, or therapy requiring special equipment to alleviate the health condition, i.e., oxygen)

Continued on next page

Family and Medical Leave, Continued

Definitions (continued)

<p>Serious Health Condition (continued)</p>	<p>b. any period of incapacity due to pregnancy or for prenatal care, even when the employee or family member does not receive treatment from a health care provider during the absence and even if the absence does not last more than three days (prenatal examinations, severe morning sickness)</p> <p>c. any period of incapacity or treatment due to a "chronic serious health condition," even when the employee or family member does not receive treatment from a health care provider during the absence and even if the absence does not last more than three days, which is defined as one:</p> <ul style="list-style-type: none"> • requiring periodic visits or treatment by a health care provider, or by a nurse or physician's assistant under the direct supervision of a health care provider, • continuing over an extended period of time (including recurring episodes of a single underlying condition), and • which may cause episodic rather than continuing period(s) of incapacity (e.g., asthma, diabetes, epilepsy, etc.) <p>d. incapacity for a permanent or long-term condition for which treatment may not be effective (Alzheimer's, a severe stroke or terminal stages of a disease)</p> <p>e. multiple treatments for restorative surgery or incapacity for serious conditions that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment (chemotherapy, radiation, dialysis, etc.)</p>
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Family and Medical Leave, Continued

Definitions (continued)

Advisory Note: Treatment includes, but is not limited to, examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations. Ordinarily, unless complications arise, the following are examples of conditions that do not meet the definition: common cold, flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, cosmetic treatments, etc. The following may meet the definition if all other conditions of this section are met: restorative dental or plastic surgery after an injury or removal of cancerous growths, mental illness resulting from stress or allergies, treatment from substance abuse.

<p>Health Care Provider</p>	<p>a Doctor of medicine or osteopathy who is authorized to practice medicine or surgery in the State of North Carolina, or any other person determined by statute, credential or licensure to be capable of providing health care services which include:</p> <ul style="list-style-type: none"> • Podiatrists • Dentists • Clinical psychologists • Clinical social workers • Health care providers from whom state approved group and HMO health plans will accept certification of a serious health condition to substantiate a claim for benefits • Foreign health care providers in above stated areas who are authorized to practice in that country and who are performing within the scope of the laws • Christian Science practitioners listed with First Church of Christian Scientists in Boston, MA. <p>(Note: In this situation, the employee cannot object to an agency requirement to obtain a second or third certification other than a Christian Science practitioner.)</p>
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Family and Medical Leave, Continued**Definitions (continued)**

Workweek	the number of hours an employee is regularly scheduled to work each week, including holidays
Reduced Work Schedule	a work schedule involving less hours than an employee is regularly scheduled to work
Intermittent Work Schedule	a work schedule in which an employee works on an irregular basis and is taking leave in separate blocks of time, rather than for one continuous period of time, usually to accommodate some form of regularly scheduled medical treatment
12-Month Period	<p>one of the following:</p> <ul style="list-style-type: none"> • the calendar year • any fixed 12-month "leave year" • the 12-month period measured forward from the date any employee's family and medical leave begins • a "rolling" 12-month period measured backward from the date an employee uses any family and medical leave <p>Note: The agency may choose either alternative provided it is applied consistently and uniformly to all employees. Employees must be given 60 days notice of any change and must not lose any benefits because of a transition.</p>

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Family and Medical Leave, Continued

Covered Employees and Eligibility

An employee's eligibility for family/medical leave shall be made based on the employee's months of service and hours of work as of the date leave is to commence.

An employee is eligible if:

the employee's appointment is	and the employee
Full-time Permanent, probationary, trainee, or time-limited, or	<ul style="list-style-type: none"> has 12 months total service with the State, and
Part-time (half-time or more) Permanent, probationary, trainee, or time-limited	<ul style="list-style-type: none"> has been in pay status at least 1040 hours during the previous 12-months.
Temporary, intermittent, or part-time (less than half-time) Note: This leave shall be without pay.	<ul style="list-style-type: none"> has 12 months service and has been in pay status at least 1250 hours during the previous 12 months.

Qualifying Reasons for Leave

The employee is entitled to a total of 12 workweeks, paid or unpaid, leave during any 12-month period for: (Note: Paid leave counts toward the 12 weeks.)

- the birth of a child and to care for the newborn child after birth, provided the leave is taken within a 12-month period following birth, or
Note: An expectant mother may also take FMLA leave before the birth of the child for prenatal care or if her condition makes her unable to work, or requires a reduced work schedule.
- the placement of or to care for a child placed with the employee for adoption or foster care, provided the leave is taken within a 12-month period following placement, or
Note: FMLA leave must also be granted before the actual placement or adoption of a child if an absence from work is required for the placement for adoption or foster care to proceed.
- the employee to care for the employee's child, spouse, or parent, where that child, spouse, or parent has a serious health condition, or
- because the employee has a serious health condition that prevents the employee from performing one or more essential functions of the position.

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Family and Medical Leave, Continued

Qualifying Reasons for Leave (cont)

Leave without pay beyond the 12-week period or for employees not covered under the FMLA Policy shall be administered under the Leave Without Pay Policy. Employees must pay for health benefits coverage.

What counts towards the 12 weeks leave?

Paid or Unpaid Leave - All approved periods of paid leave and periods of leave without pay (including leave without pay while drawing short-term disability benefits) count towards the 12 workweeks to which the employee is entitled. This includes leave taken under the Voluntary Shared Leave Policy.

Workers' Compensation Leave - If an employee is out on workers' compensation leave drawing temporary total disability, the time away from work is not considered as a part of the FMLA 12-week entitlement.

Compensatory Leave - The agency cannot require an employee to use compensatory time for unpaid FMLA leave.

Leave Charges Options

The employee has the following options for charging leave:

If leave is for:	the employee :
Birth (applies to both parents) and child care after birth	may choose to exhaust available vacation and/or sick leave, or any portion, or go on leave without pay; except that sick leave may be used only during the period of disability.
Adoption	may choose to exhaust available vacation leave (or any portion), a maximum of 30 days sick leave (see Sick Leave Policy), or go on leave without pay.
Foster Care	may choose to exhaust available vacation leave (or any portion) or go on leave without pay.
Illness of Child, Spouse, Parent	may choose to exhaust available sick and/or vacation leave, or any portion, or go on leave without pay.
Employee's Illness	shall exhaust available sick leave and may choose to exhaust available vacation leave, or any portion. If the illness extends beyond the 60-day waiting period required for short-term disability, the employee may choose to exhaust the balance of available leave or begin drawing short-term disability benefits.

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Family and Medical Leave, Continued

**Intermittent
Leave or
Reduced Work
Schedule**

An employee may take leave intermittently or on a reduced schedule to care for the employee's child, spouse, or parent who has a serious health condition, or because the employee has a serious health condition.

If the leave is for child birth and birth related child care or for adoption/foster care, the agency must agree to intermittent leave or a reduced work schedule.

There is no minimum limitation on the amount of leave taken intermittently; however, the agency may not require leave to be taken in increments of more than one hour.

If leave is foreseeable, based on planned medical treatment, the agency may require the employee to transfer temporarily to an available alternative position for which the employee is qualified and that has equivalent pay and benefits and better accommodates recurring periods of leave.

Only the time actually taken as leave may be counted toward the 12 week of leave to which the employee is entitled.

Example: An employee normally works 40 hours each week. The employee is on a reduced work schedule of 20 hours per week. The FMLA leave may continue for up to 24 calendar weeks.

Procedure: If an employee works a reduced or intermittent work schedule and does not use paid leave to make up the difference between the normal work schedule and the new temporary schedule to bring the number of hours worked up to the regular schedule, the agency must submit a Form PD-105 showing a change in the number of hours the employee is scheduled to work. This will result in an employee earning pay and leave at a reduced rate.

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Family and Medical Leave, Continued

AGENCY RESPONSIBILITIES

Notification of FMLA Provisions In addition to posting the FMLA provisions, the agency must include the FMLA provisions in all written publications, such as handbooks, etc.,. In addition, each time an employee provides notice of the need for FMLA leave, the agency shall provide the employee with written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations.

Note: Agencies may duplicate and provide the employee a copy of the **FMLA Fact Sheet available from the Wage and Hour Division.**

Notice of Eligibility It is the agency's responsibility to determine that an employee is eligible for FMLA leave. If an employee notifies the agency of the need for FMLA leave before the employee meets the eligibility criteria, the agency is required to:

- confirm the employee's eligibility effective on the date leave is to start, or
- advise the employee when the requirement will be met.

This decision cannot be reversed. No additional notice for FMLA leave from the employee is required.

If the agency does not advise the employee whether the employee is eligible prior to the date the leave is to start, the employee will be deemed eligible. The agency may not, then, deny the leave.

If the employee does not give notice of the need for leave more than two workdays before beginning leave, the employee will be deemed to be eligible unless notified of ineligibility within two workdays of the date the notice is received.

Continued on next page

Family and Medical Leave, Continued

Designation of Leave as FMLA Leave It is the responsibility of the agency to:

- determine that leave requested is for a FMLA qualifying reason, and
- designate leave, whether paid or unpaid, as FMLA leave even when an employee would rather not use any of the FMLA entitlement.

The key in designating FMLA leave is the qualifying reason(s), not the employee's election or reluctance to use FMLA leave or to use all, some or none of the accrued leave. The agency's designation must be based on information obtained from the employee or an employee's representative (e.g., spouse, parent, physician, etc.).

Designation of Paid Leave as FMLA Leave When an employee gives notice of the need for FMLA leave and the employee is using paid leave, whether required or optional, the agency shall designate whether it qualifies for FMLA leave before the leave starts. If information is not sufficient to make the determination, the agency shall require the employee to provide the information. All leave taken can be designated as FMLA leave; however, if sufficient information was available and the designation or notice was not given, the leave cannot be designated as FMLA leave retroactively.

When an employee is on paid leave but has not given notice of the need for FMLA leave, the agency shall, after a period of 10 workdays, request that the employee provide sufficient information to establish whether the leave is for a FMLA-qualifying reason. This does not preclude the agency from requesting the information sooner, or at any time an extension is requested.

If an absence which begins as other than FMLA leave later develops into an FMLA qualifying absence, the entire portion of the leave period that qualifies under FMLA may be counted as FMLA leave.

Once the agency has knowledge that the leave is being taken for an FMLA required reason, the agency must, within two business days absent extenuating circumstances, notify the employee that the leave is designated and will be counted as FMLA leave. **The notice may be oral or in writing, but must be confirmed in writing no later than the following payday.**

Continued on next page

Family and Medical Leave, Continued

Designation of FMLA Leave After Return to Work

The agency may not designate leave that has already been taken as FMLA leave after the employee returns to work, with two exceptions:

- if an employee is out for a reason that qualifies for FMLA leave and the agency does not learn of the reason for the leave until the employee returns to work, the agency may designate the leave as FMLA leave within two business days of the employee's return; or
- if the agency has provisionally designated the leave under FMLA leave and is awaiting receipt from the employee of documentation.

Similarly, the employee is not entitled to the protection of the FMLA if the employee gives notice of the reason for the leave later than two days after returning to work.

EMPLOYEE RESPONSIBILITIES

Notice

The employee shall give notice to the supervisor of the intention to take leave under this policy. The employee must explain the reasons for the needed leave in order to allow the agency to determine that the leave qualifies under the Act.

If the reason for leave is:	the employee shall:
Birth/Adoption/Foster Care	give the agency 30 days' notice, in writing. If the date of the birth or adoption requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable, which means within one or two business days of when the need for leave becomes known to the employee.
Planned Medical Treatment	give 30 day's notice if practicable. It is mandatory that the employee consult with the supervisor prior to the request for FMLA.
Medical Emergency	not be required to give advance written notice.

If the employee will not return to work after the period of leave, the agency shall be notified in writing. Failure to report at the expiration of the leave, unless an extension has been requested, may be considered as a resignation.

Continued on next page

Family and Medical Leave, Continued

Certification The employee shall provide certification in accordance with the provisions listed below. If the employee does not provide medical certification, any leave taken is not FMLA leave.

CERTIFICATION

Certification Requirements **Adoption** - The agency may require that a claim for leave because of adoption or foster care be supported by reasonable proof of adoption or foster care.

Medical Certification - The agency may require that a claim for leave because of a serious illness of the employee or of the employee's child, spouse, or parent be supported by a certification from the health care provider; however, if the employee is using paid leave, the agency cannot require a more stringent certification than normally required. If the employee is using unpaid FMLA leave, the certification requirements can be no greater than the following:

- When the leave is foreseeable and at least 30 days notice has been provided, the employee should provide the medical certification before the leave begins.
- When it is not possible to provide the medical certification before the leave begins, the employee must provide the requested certification to the agency within the time frame requested by the agency (which must allow at least 15 calendar days after the agency's request), unless it is not practicable under the circumstances.
- At the time the agency requests certification, the agency must also advise the employee of the anticipated consequences of an employee's failure to provide adequate certification. The agency shall also provide the employee a reasonable opportunity to correct any incomplete information.

Note: Medical Certification Form - Form WH-380, developed by the Department of Labor as an optional form for use in obtaining medical certification, including second and third opinions, may be used. Another form containing the same basic information may be used; however, no information in addition to that requested on Form WH-380 may be required.

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Family and Medical Leave, Continued

Validity of the Certification

If an employee submits a complete certification signed by the health care provider, the agency may not request additional information; however, a health care provider representing the agency may contact the employee's health care provider, with the employee's permission, for purposes of clarification and authenticity of the medical certification.

Second Opinion - An agency that has reason to doubt the validity of a medical certification may require the employee to obtain a second opinion with the following conditions:

- The agency bears the expenses, including reasonable "out of pocket" travel expenses.
- The agency may not require the employee or family member to travel outside normal commuting distance except in very unusual circumstance.
- Pending receipt of the second (or third) opinion, the employee is provisionally entitled to FLMA leave.
- If the certifications do not ultimately establish the employee's entitlement to FMLA leave, the leave shall not be designated as FMLA leave.
- The agency is permitted to designate the health care provider to furnish the second opinion, but the selected health care provider may not be employed on a regular basis by the agency unless the agency is located in an area where access to health care is extremely limited.

Third Opinion - If the opinions of the employee's and the agency's designated health care providers differ, the agency may require the employee to obtain certification from a third health care provider, again at the agency's expense. This third opinion shall be final and binding. The third health care provider must be designated or approved jointly by the agency and the employee.

The agency is required to provide the employee, within two business days, with a copy of the second and third medical opinions, where applicable, upon request by the employee.

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Family and Medical Leave, Continued

**Recertification
of Medical
Conditions**

An agency may request recertification no more often than every 30 days unless:

- an extension is requested,
- circumstances described by the previous certification have changed significantly, or
- the agency receives information that casts doubt upon the employee's stated reason for the absence.

If the minimum duration specified on a certification is more than 30 days, the agency may not request recertification until that minimum duration has passed unless one of the conditions above is met.

The employee must provide the requested recertification to the agency within the time frame requested by the agency (which must allow at least 15 calendar days after the agency's request), unless it is not practicable under the particular circumstances.

Any recertification requested by the agency shall be at the employee's expense unless the agency provides otherwise. No second or third opinion on recertification may be required.

EMPLOYMENT AND BENEFITS PROTECTION**Reinstatement**

The employee shall be reinstated to the same position held when the leave began or one of like pay grade, pay, benefits, and other conditions of employment. The agency may require the employee to report at reasonable intervals to the agency on the employee's status and intention to return to work. The agency may require that the employee provide certification that the employee is able to return to work.

Benefits

The employee shall be reinstated without loss of benefits accrued when the leave began. All benefits accrue during any period of paid leave; however, no benefits will be accrued during any period of leave without pay.

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Family and Medical Leave, Continued

Health Benefits The State shall maintain coverage for the employee under the State's group health plan for the duration of leave at the level and under the conditions coverage would have been provided if the employee had continued employment. Any share of health plan premiums which an employee had paid prior to leave must continue to be paid by the employee during the leave period. The agency must give advance written notice to employees of the terms for payment of premiums during FMLA leave. The obligation to maintain health insurance coverage stops if an employee's premium payment is more than 30 days late. The agency shall provide 15 days notice that coverage will cease.

If the employee's failure to make the premium payments leads to a lapse in coverage, the agency must still restore the employee, upon return to work, to the health coverage equivalent to that which the employee would have had if leave had not been taken and the premium payments had not been missed without any waiting period or preexisting conditions.

Advisory Note: Even if the employee chooses not to maintain group health plan coverage for dependents or if coverage lapses during FMLA leave, the employee is entitled to be reinstated on the same terms as prior to taking leave, including family or dependent coverage, without any qualifying period, physical examination, exclusion of pre-existing condition, etc. Therefore, the agency should assure that health benefits coverage will be reinstated; otherwise, the agency would need to pay the premium and recover it after the employee returns to work.

The agency may recover the premiums if the employee fails to return after the period of leave to which the employee is entitled has expired for a reason other than the continuation, recurrence, or onset of a serious health condition or other circumstances beyond the employee's control.

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Family and Medical Leave, Continued

INTERFERENCE WITH RIGHTS

Actions Prohibited It is unlawful to interfere with, restrain, or deny any right provided by this policy or to discharge or in any other manner discriminate against an employee for opposing any practice made unlawful by this policy.

Protected Activity It is unlawful to discharge or in any other manner discriminate against any employee because the employee does any of the following:

- files any civil action, or institutes or causes to be instituted any civil proceeding under or related to this policy;
- gives, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided by this policy; or
- testifies, or is about to testify, in any inquiry or proceeding relating to any right provided under this policy.

ENFORCEMENT

Violations A violation of or denial of leave requested pursuant to the Family and Medical Leave Act of 1993 is not a contested case and creates no right of grievance or appeal under the State Personnel Act.

Violations can result in any of the following or a combination of any of the following and are enforced by the U. S. Secretary of Labor:

- U. S. Department of Labor investigation,
- Civil liability with the imposition of court cost and attorney's fees, or
- Administrative action by the U. S. Department of Labor.

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Family and Medical Leave, Continued

POSTING AND RECORDKEEPING REQUIREMENTS

Posting Agencies are required to post and keep posted, in a conspicuous place, a notice explaining the FMLA provisions and providing information concerning the procedures for filing complaints of violations of the Act with the U. S. Department of Labor, Wage and Hour Division.

Note: Copies of the required notice may be obtained from local offices of the Wage and Hour Division.

Records Agencies are required to keep records for no less than three years and make them available to the Department of Labor upon request.

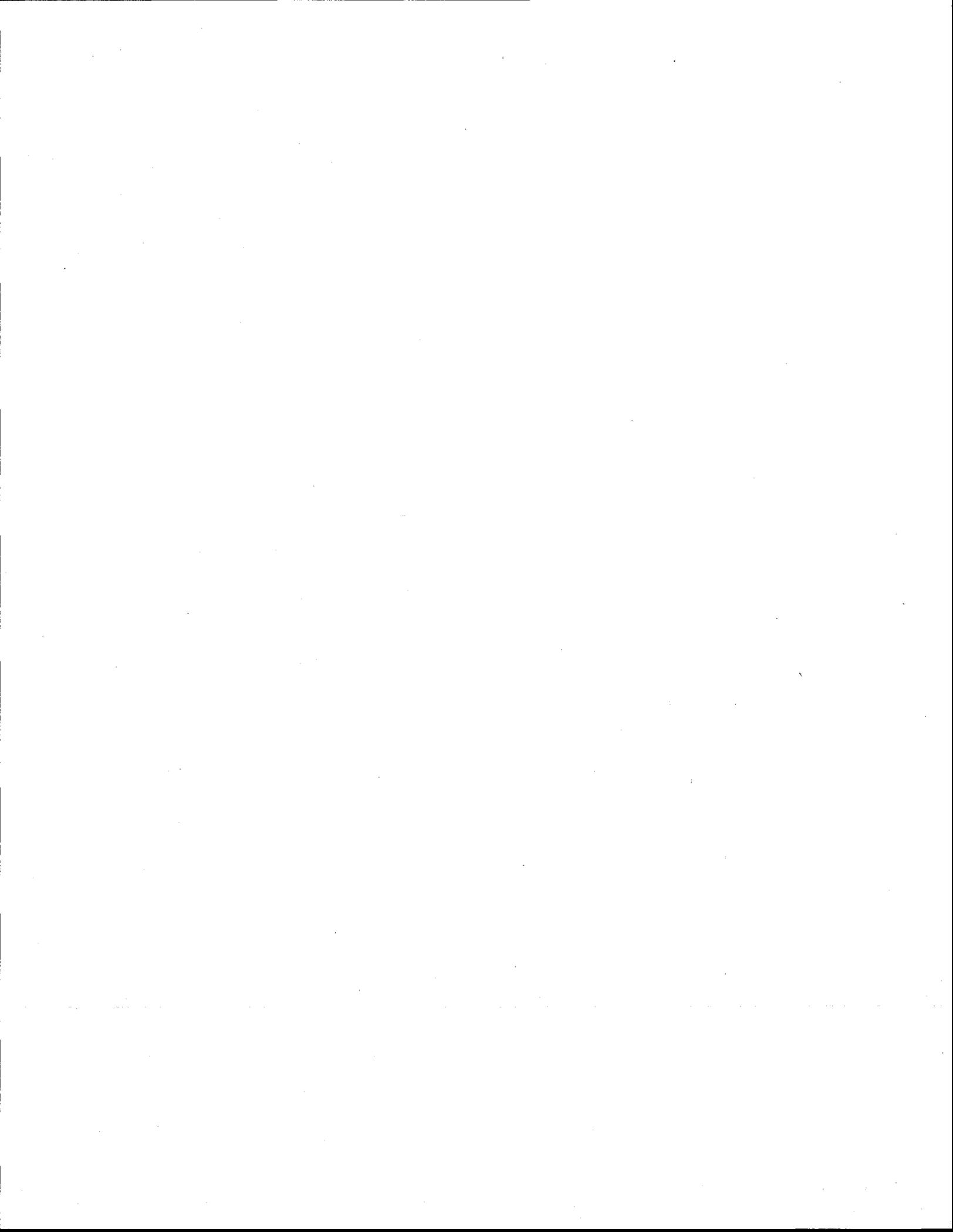
In addition to the records required by the Fair Labor Standards Act, the agency must keep records of:

- dates FMLA leave is taken,
- hours of leave if less than a full day,
- copies of employee notices,
- documents describing employee benefits,
- premium payments of employee benefits, and
- records of any disputes.

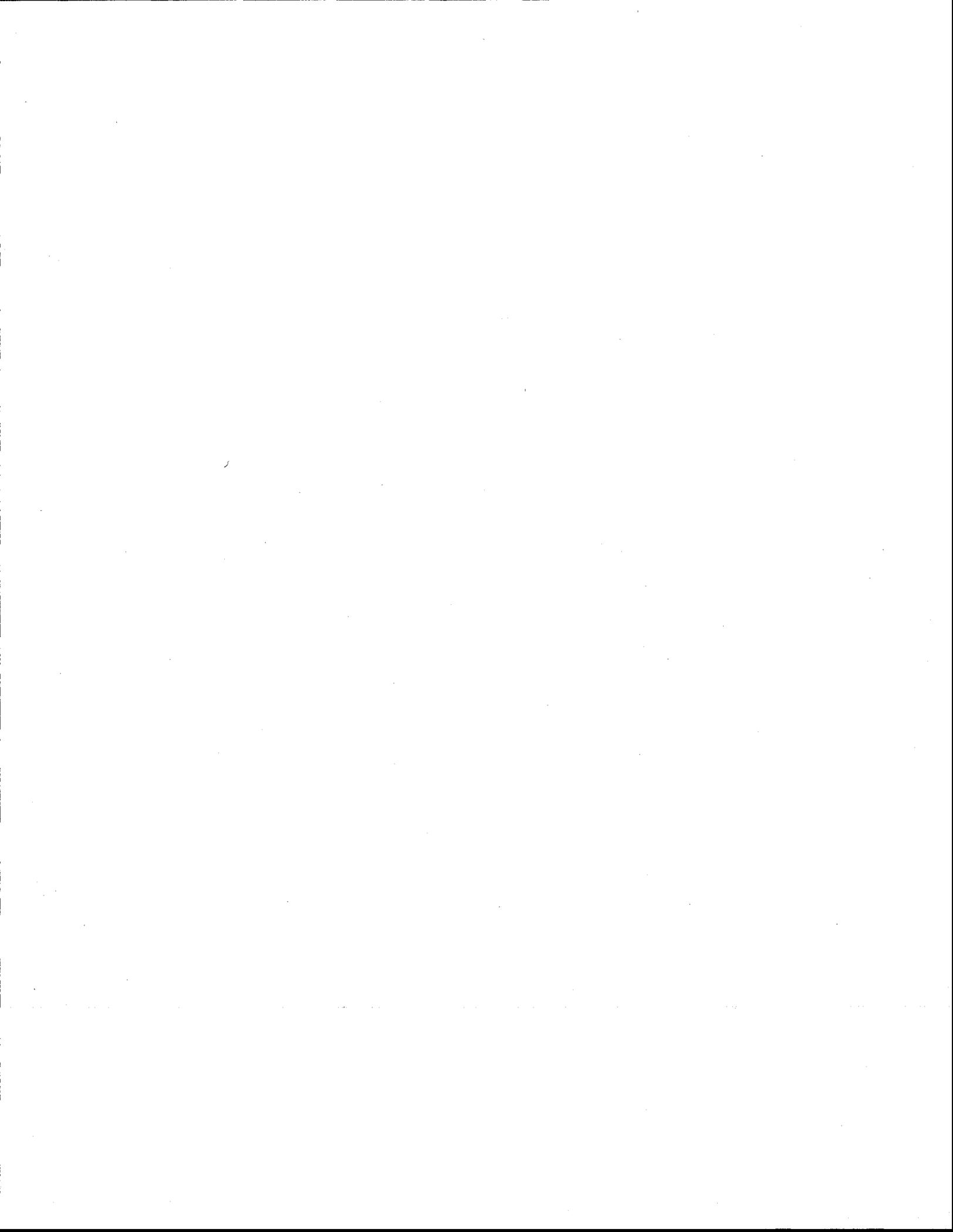
Records and documents relating to medical certifications, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files, and if ADA is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements, except that:

- Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations.
- First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment.
- Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

FOR FURTHER INFORMATION, SEE THE FAMILY AND MEDICAL LEAVE ACT OF 1993.



APPENDIX D



DRAFT

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1999

S/H

D

99-ROZ-021(4.27)

(THIS IS A DRAFT AND IS NOT READY FOR INTRODUCTION)

Short Title: State Employee FMLA.

(Public)

Sponsors:

Referred to:

- 1 A BILL TO BE ENTITLED
2 AN ACT CLARIFYING STATE EMPLOYEES' ELIGIBILITY FOR FAMILY AND
3 MEDICAL LEAVE BENEFITS.
4 The General Assembly of North Carolina enacts:
5 Section 1. Chapter 126 of the General Statutes is
6 amended by adding a new section to read:
7 "§ 126-8.4. Family and medical leave.
8 (a) Each eligible State employee, subject to the provisions of
9 this Chapter, shall be entitled to a total of 12 workweeks of
10 leave during any 12-month period for the following reasons:
11 (1) For the employee to care for the employee's child
12 after the child's birth, if the leave is taken
13 within 12 months after the birth;
14 (2) For the employee to care for a child placed with
15 the employee for adoption, if the leave is taken
16 within 12 months of the date of placement;
17 (3) For the employee to care for the employee's child,
18 spouse, or parent, where that child, spouse, or
19 parent has a serious health condition; or

1 (4) Because the employee has a serious health condition
2 that makes the employee unable to perform the
3 functions of the employee's position.

4 In order to be eligible for this benefit, an employee must have
5 been employed by the State for at least 12 months, and employed
6 by the State for at least 1,250 hours of service during the
7 previous 12-month period.

8 (b) No head of any State department, agency or institution, or
9 other State employee exercising supervisory authority shall
10 discharge, demote, transfer, or otherwise discriminate against
11 any employee for the exercise of, or the attempt to exercise, any
12 right provided by this section.

13 (c) The State Personnel Commission shall adopt rules to
14 implement the provisions of this section."

15 Section 2. G.S. 126-34.1(a) reads as rewritten:

16 "§ 126-34.1. Grounds for contested case under the State Personnel
17 Act defined.

18 (a) A State employee or former State employee may file in the
19 Office of Administrative Hearings a contested case under Article
20 3 of Chapter 150B of the General Statutes only as to the
21 following personnel actions or issues:

22 (1) Dismissal, demotion, or suspension without pay
23 based upon an alleged violation of G.S. 126-35, if
24 the employee is a career State employee.

25 (2) An alleged unlawful State employment practice
26 constituting discrimination, as proscribed by G.S.
27 126-36, including:

28 a. Denial of promotion, transfer, or training, on
29 account of the employee's age, sex, race,
30 color, national origin, religion, creed,
31 political affiliation, or handicapping
32 condition as defined by Chapter 168A of the
33 General Statutes.

34 b. Demotion, reduction in force, or termination
35 of an employee in retaliation for the
36 employee's opposition to alleged
37 discrimination on account of the employee's
38 age, sex, race, color, national origin,
39 religion, creed, political affiliation, or

- 1 handicapping condition as defined by Chapter
2 168A of the General Statutes.
- 3 (3) Retaliation against an employee, as proscribed by
4 G.S 126-17, for protesting an alleged violation of
5 G.S. 126-16.
- 6 (4) Denial of the veteran's preference granted in
7 accordance with Article 13 of this Chapter in
8 initial State employment or in connection with a
9 reduction in force, for an eligible veteran as
10 defined by G.S. 126-81.
- 11 (5) Denial of promotion for failure to post or failure
12 to give priority consideration for promotion or
13 reemployment, to a career State employee as
14 required by G.S. 126-7.1 and G.S. 126-36.2.
- 15 (6) Denial of an employee's request for removal of
16 allegedly inaccurate or misleading information from
17 the employee's personnel file as provided by G.S.
18 126-25.
- 19 (7) Any retaliatory personnel action that violates G.S.
20 126-85.
- 21 (8) Denial of promotion in violation of G.S. 126-14.2,
22 where an initial determination found probable cause
23 to believe there has been a violation of G.S. 126-
24 14.2.
- 25 (9) Denial of employment in violation of G.S. 126-14.2,
26 where an initial determination found probable cause
27 to believe that there has been a violation of G.S.
28 126-14.2.
- 29 (10) Harassment in the workplace based upon age, sex,
30 race, color, national origin, religion, creed, or
31 handicapping condition, whether the harassment is
32 based upon the creation of a hostile work
33 environment or upon a quid pro quo.
- 34 (11) Denial of an eligible employee's request for family
35 and medical leave, or retaliation against an
36 employee for exercising rights provided by G.S.
37 126-8.4."

38 Section 3. Nothing in this act shall be construed as
39 diminishing the rights of, or remedies available to any State
40 employee under statute, rules or at common law.

1 Section 4. This act becomes effective when it becomes
2 law.



99-ROZ-021(4.27): State Employee FMLA

BILL ANALYSIS

Committee: LRC- Administrative Process for State Employees Grievances	Introduced by:
Date: April 27, 2000	Summary by: Karen Cochrane-Brown and Theresa Matula
Version: 99-ROZ-021(4.27)	Committee Staff

SUMMARY: 99-ROZ-021(4.27) adds a new section to Chapter 126 of the General Statutes clarifying State employees' eligibility for family and medical leave benefits and amends G.S. 126-34.1 allowing denial of a request or retaliation for exercising family and medical leave rights to be grounds for a contested case pursuant to the State Personnel Act

CURRENT LAW:

Congress passed the Family and Medical Leave Act (FMLA) in 1993. The federal Family and Medical Leave Act entitles an eligible employee up to 12 weeks of leave during any 12-month period for one or more of the following reasons:

- (A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.
- (B) Because of the placement of a son or daughter with the employee for adoption or foster care.
- (C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.
- (D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

Entitlement to leave for the birth or placement of a son or daughter, subparagraphs (A) and (B), shall expire at the end of the 12-month period beginning on the date of such birth or placement. Employees must provide sufficient certification and there is a requirement for notice of foreseeable leave. Under certain circumstances, leave may be taken intermittently or on a reduced schedule and an employer may require an employee to exhaust accumulated leave. Employees must have worked for the employer at least 12 months and for at least 1,250 hours during the 12-month period. Upon return from Family and Medical Leave employees must be restored to the position they held when the leave commenced, or to an equivalent position. Taking FML shall not result in the loss of any employment benefit accrued prior to the date on which the leave commenced. The employer may recover the premium that the employer paid for maintaining coverage for the employee under a group health plan during any period of unpaid leave if the employee fails to return from leave after the period of leave to which the employee is entitled has expired; and the employee fails to return to work for a reason other than-

- the continuation, recurrence, or onset of a serious health condition that entitles the employee to leave under subparagraph (C) or (D); or
- other circumstances beyond the control of the employee.

Shortly after the federal law was enacted, the State Personnel Commission, acting under the authority of G.S. 126-4(5) established rules and policies covering family and medical leave for State employees. Currently, there is no statute in North Carolina specifically granting State employees family and medical leave, like most State employee leave benefits it is outlined in the North Carolina Administrative Code and in the State Personnel Manual.

Recent federal court cases have raised questions as to whether (1) Congress acted within the scope of its authority in abrogating state's immunity under the Eleventh Amendment of the Constitution, and (2) the Family and Medical Leave Act is unconstitutional as applied to the states under the Tenth Amendment. Additionally, the North Carolina Administrative Code (NCAC) 25-1E.1410 (c) states that "A violation of or denial of leave requested pursuant to the

99-ROZ-021(4.27)

Page 2

Family and Medical Leave Act of 1993 is not a contested case and creates no right of grievance or appeal pursuant to the State Personnel Act (G.S. 126),” violations are enforced by the U.S. Secretary of Labor.

BILL ANALYSIS:

The following is an outline of the sections in 99-ROZ-021(4.27):

Section 1:

Section 1 amends Chapter 126 of the General Statutes by adding a new section clarifying State employees' eligibility for family and medical leave benefits. G.S. 126-8.4 entitles an employee to a total of 12 workweeks of leave during any 12-month period for the birth or adoption of a child; to care for a child, spouse, or parent who has a serious health condition; or due to an employee's serious health condition. Leave taken for the birth or adoption of a child must be taken within 12 months from the birth or date of placement. An employee shall not be discriminated against for the exercise of, or attempt to exercise any right provided under the section. The State Personnel Commission shall adopt rules to implement the provisions of this section.

Section 2:

Section 2 amends G.S. 126-34.1 to allow denial of an employee's request for family and medical leave, or retaliation against an employee for exercising rights provided under G.S. 126-8.4 to be grounds for filing a contested case pursuant to the State Personnel Act.

Section 3:

Section 3 allows that nothing in the bill shall be construed as diminishing the rights of or remedies available to any State employee under statute, rules, or common law.

Section 4:

Section 4 states that this act becomes effective when it becomes law.

